Supreme Court, U.S.
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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

TECHNICAL SERGEANT DAVID R. CURTIS,
PETITIONER

v.

UNITED STATES OF AMERICA, RESPONDENT

Petition For a Writ of Certiorari to the United States Court of Appeals for the Armed Forces

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PETITION FOR WRIT OF CERTIORARI

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April 1997

35 pp

QUESTION PRESENTED

Whether the United States Court of Appeals for the Armed Forces erred when it found that questions, testimony and argument concerning Lasix, a nonprescription diuretic, was relevant to the offense for which petitioner was being tried.

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The petitioner, Technical Sergeant David R. Curtis, respectfully prays that a writ of certiorari issue to review the order and judgment of the United States Court of Appeals for the Armed Forces entered in his case on 22 January 1997.

OPINIONS BELOW

The order and judgment of the United States Court of Appeals for the Armed Forces is not yet reported in an advance sheet or the Military Justice Reporter. The decision, No. 96–0104,—M.J.— (22 January 1997), is located at Appendix A. The opinion of the United States Air Force Court of Criminal Appeals, ACM S28841 (A.F. Ct. Crim. App. 1995, 29 August 1995), is located at Appendix B.

JURISDICTION

The judgment of the United States Court of Appeals for the Armed Forces was entered on 22 January 1997. The jurisdiction of this Court is invoked under 28 U.S.C.A. § 1259 (3) (West Supp. 1996) and 10 U.S.C.A. § 867(a) (West Supp. 1996).

STATEMENT OF THE CASE

At the petitioner's special court-martial on the charges of wrongful use and wrongful possession of marijuana in violation of Article 112a, Uniform Code of Military Justice, the military judge permitted court members to ask questions, witnesses to testify, and counsel to argue, concerning Lasix, a nonprescription diuretic. Defense Counsel objected claiming that the solicited evidence was not relevant to the offenses for which petitioner was being tried.

Petitioner was convicted and was sentenced to a bad conduct discharge, confinement for six months[1], and a reduction to Senior Airman (E–4).

On appeal to the Air Force Court of Criminal Appeals, the Air Force Court held that, once the report which contained the word "Lasix" was properly admitted into evidence, questions regarding Lasix were relevant. On appeal to the United States Court of Appeals for the Armed Forces, that Court agreed that evidence relating to Lasix was relevant.

REASON FOR GRANTING THE WRIT

THE UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES ERRED WHEN IT FOUND THAT QUESTIONS, TESTIMONY, AND ARGUMENT CONCERNING LASIX, A NONPRESCRIPTION DIURETIC, WERE RELEVANT TO THE OFFENSE FOR WHICH PETITIONER WAS BEING TRIED.

The Air Force Office of Special Investigations (OSI) began an investigation of the petitioner based on allegations made against him by his sons, Daniel Curtis and Matt Curtis. (R. 96–97). On 2 February 1993, the petitioner's house was searched by the OSI and civilian police officers pursuant to a civilian search warrant. (R. 98). The search revealed marijuana seeds and stems, a paper clip with marijuana resin on it, and a straw with marijuana resin on it. (R. 111–114, Pros. Ex. 1).

During the search, the petitioner was held at the Security Police office. Following the search, the petitioner was taken to the OSI office where he volunteered to take a urinalysis test.

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[1]This was the maximum amount of confinement that could be imposed by a Special Court-Martial.

His sample tested positive for THC, a metabolite of marijuana. (R. 245–246). The DOD cutoff level for THC is 15 ng/ml, the petitioner's sample tested at 22 ng/ml. (Pros. Ex. 12, p. 1).

The petitioner's wife, Robin Curtis, testified that she was a manic depressive who had smoked marijuana for several years. She testified that the marijuana found in the house was hers and that the petitioner was unaware of it or of her use of marijuana. (R. 304–305).

The petitioner testified that he had not knowingly used marijuana during the period alleged. He was unaware of how the marijuana got into his body and could only speculate that he had ingested it by eating chocolate chip cookies made from marijuana, given to him by his son with whom he did not have a good relationship. (R. 246–249).

During the search of the petitioner's home, the OSI also discovered a substance called "Lasix." Lasix is a non-prescription diuretic used to increase urination. Since THC (the marijuana metabolite) is excreted through urine, there is a belief by some that use of Lasix may help the body void the traces of marijuana. *United States v. Curtis*, ACM S28841, (29 August 1995, slip op. at 5)(Appendix B). There is no evidence in the record to show that petitioner holds this "belief." No charges were brought against the petitioner related to the Lasix[2]. The word "Lasix" appeared under the column "Additional Drug Tests" on the Urinalysis Custody and Report Record. (Pros. Ex. 12, p. 2). The government expert witness testified on direct examination that "Lasix" is a trade name for furosemide, a diuretic, and that Brooks Lab does not have the capability to test for it. (R. 179).

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[2]Lasix itself is not a controlled substance.

SMSgt Landis, one of the court members (military juror), asked the expert witness additional questions concerning the Lasix (App. Ex. VII, R. 223–224). The defense objected to the questions on grounds of relevance. The military judge allowed the questions. In response to the first question, the witness testified:

> My understanding of the sample or the circumstance was that there was suspicion that the individual was taking Lasix to dilute the urine sample; and, therefore, they requested that the sample be tested for the presence of Lasix.

(R. 223).

During trial, the military judge allowed questions, testimony and argument concerning a Lasix. Trial counsel elicited testimony from the government's expert witness and the accused, the members asked questions, and the trial counsel argued in findings concerning Lasix. The military judge abused her discretion in determining that the evidence concerning Lasix was relevant and also abused her discretion in performing a Mil.R.Evid. 403[3] balancing test in determining that the probative value of this irrelevant evidence outweighed its prejudicial impact.

Military Rule of Evidence 401 provides that evidence is relevant if it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." *United States v. Walker*, 42 U.S. 67 (1995); *United States v. Thomas*, 40 M.J. 252 (C.M.A. 1994). Military Rule of Evidence 402 provides that "[a]ll relevant evidence is admissible," with certain exceptions. *United States v. Elmore*, 33 M.J. 387 (C.M.A. 1991).

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[3]Mil.R.Evid 403 is identical to its Federal Counterpart, Fed.R. Evid. 403.

The Military Rules of Evidence have combined the common law concepts of relevance and materiality into one rule of relevancy. *See* S. Saltzburg, L. Schinasi, & D. Schlueter, *Military Rules of Evidence Manual* 422 (3d ed. 1991). In analyzing relevance, this Honorable Court must confront two questions: (1) Does the evidence have any tendency to make the existence of any fact more or less probable?; and (2) Is that fact of consequence to a determination of petitioner's guilt? *United States v. Scheffer,* 41 M.J. 683 (A.F. Ct. Crim. App. 1995) *rev. on other grounds,* 44 M.J. 442 (1996).

In determining whether a particular item of evidence is "relevant", a court must examine whether the proffered evidence has any tendency to make a matter in issue—whether the petitioner may have unknowingly ingested the marijuana—more or less likely? The proponent of the evidence had the burden of (1) describing the evidence, (2) explaining its nexus to the consequential issue at bar, and (3) indicating how the offered evidence would establish the fact in question. *United States v. Shover,* 42 M.J. 753 (A.F. Ct. Crim. App. 1995), *see also* Saltzburg, *supra.*

> Even if relevant, evidence is to be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the members, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

Mil.R.Evid. 403

A military judge's decision to admit or exclude evidence is reviewed under the abuse-of-discretion standard. *United States v. Bins,* 43 M.J. 79 (1995); *United States v. Gray,* 40 M.J. 77 (C.M.A. 1994), *Untied States v. Orsburn,* 31 M.J. 182 (C.M.A. 1990). If the decision to admit or exclude evidence

requires fact-finding, the findings are reviewed under a clearly erroneous standard. *United States v. Quigley*, 40 M.J. 64 (C.M.A. 1994) ("findings of fact will be set aside only if clearly erroneous," *citing, Bourjaily v. United States,* 483 U.S. 171, 107 S. Ct. 2775, 97 L.Ed.2d 144 (1987)). A military judge abuses his discretion if the findings of fact are clearly erroneous or if the decision is influenced by an incorrect view of the law. *United States v. Sullivan,* 42 M.J. 360 (1995).

At trial, while the government expert witness, Major Robert Schwarzhoff, was testifying concerning the urinalysis examination and the results, trial counsel elicited information concerning a substance called "Lasix." Major Schwarzhoff testified that Lasix is a trade name for a drug called furosemide, a diuretic, used for certain patients to increase fluid output. (R. 179). Later, over defense counsel's objection, the military judge permitted a court-member to ask questions concerning Lasix. Major Schwarzhoff then testified concerning the reason that testing for Lasix was requested:

> My understanding of the sample or the circumstances was that there was suspicion that the individual was taking Lasix to dilute the urine sample; and, therefore, they requested that the sample be tested for the presence of Lasix

(R. 223). No testing for Lasix was ever conducted.

In addition, trial counsel was permitted, over a timely defense objection, to cross examine the petitioner concerning Lasix. During the Article 39(a) session the trial defense counsel made his objection clear and the following transpired:

> DC: Your Honor, my objection is that—Lasix—there's been some talk—and certainly I objected to it before, but I don't think this is relevant as to his charge, and there's really been no evidence showing that he knew

anything about it or that he used it or anything like that, and this is just—if it's anything, it's uncharged misconduct—if it's misconduct at all.

MJ: Captain Greenfield?

TC: Well, Your Honor, it may well be uncharged misconduct, but I think it's extremely probative on a couple of issues.

MJ: What would be the uncharged misconduct? It's a diuretic according to the expert.

TC: I don't know for sure, Your Honor, but I believe it may be a prescription medication, and I—

MJ: What are you getting at with this area?

TC: —well, Your Honor, it is a diuretic; and when the accused spoke to the OSI, he indicated some knowledge about having the substance and its properties and certainly there was testimony from the expert witness that one of the factors that can affect testability of the concentration of the metabolite in the system as well as even the detection depends upon how often an individual goes to the bathroom. Now, certainly it's relevant if he has at his disposal something that can dilute the concentration of the urinalysis sample. Captain David—

MJ: Do I understand that he made a statement to the OSI in which he discussed it?

TC: —yes, ma'am.

MJ: Captain David, it seems to me it's relevant.

DC: Okay, Your Honor.

MJ: If there is some kind of concern about uncharged misconduct, depending on how the

> evidence comes out, I can certainly instruct on it; but I think this is a valid area of inquiry, and performing the balancing test under Rule 403, I'm going to allow this area of inquiry.

(R. 252–253). There was no testimony about the effect of Lasix on a urine sample. In addition, there was no statement to the OSI offered in evidence. This testimony was not relevant because it did not prove or disprove a fact in consequence, that is, whether the petitioner had unknowingly ingested the marijuana. The prosecution, as the proponent of this evidence, had the burden of describing the evidence, explaining its nexus to the consequential issue at bar, and indicating how the offered evidence would establish the fact in question. Although the trial counsel did identify the evidence (Lasix), he did not show the nexus between the Lasix and the petitioner's alleged drug use. The military judge erred by finding that the evidence was relevant. The military judge performed her M.R.E. 403 balancing test based on the unsubstantiated proffer of trial counsel and not on evidence properly before the court. While a military judge has a great deal of discretion in performing a M.R.E. 403 balancing test, *United States v. Rust,* 41 M.J. 472 (1995), the military judge abused her discretion.

The actual substance, Lasix, was not in evidence. There was no testimony concerning the seizure of the Lasix. In addition there is nothing more than innuendo and speculation showing that the petitioner even knew about the alleged effects of Lasix. Contrary to the Air Force Court of Criminal Appeals' opinion, there was no evidence that there was "a belief among drug users that Lasix is helpful in ridding one's system of evidence of drug use." The military judge seemed to rely on the fact that the petitioner had made a statement to the

OSI in performing her M.R.E. 403 balancing test.[4] There was no such statement to OSI in evidence.

In *United States v. Perry,* 37 M.J. 363 (C.M.A. 1993), the accused was charged with unlawful use of cocaine. In *Perry,* the trial counsel elicited testimony that the accused had worked as an OSI informant and that, when he lived in the dormitory, he had heard rumors about people using drugs. He then gave the OSI the names of those people and "checked them out" for the OSI. In *Perry,* the defense argued that the prosecution was using this evidence to show "guilt by association." This Honorable Court ruled this evidence irrelevant because the "Petitioner's knowledge of the identity of possible drug users neither proves nor disproves that, during the time period alleged, he knowingly used cocaine." Likewise, in the case *sub judice,* the presence of Lasix in the petitioner's house neither proves nor disproves that, during the time period charged, he knowingly used marijuana.

This testimony was totally irrelevant to the facts at issue and was highly prejudicial to the petitioner. The petitioner had no advance notice of the search of this home. During the search, he was held at the security police building. As soon as the OSI returned from the search to question the petitioner, he immediately volunteered to take a urinalysis test. He had absolutely no opportunity to use Lasix to try to affect his urinalysis test. (R. 245–246).

The petitioner was clearly prejudiced by this testimony. This testimony allowed the trial counsel to inject innuendo and speculation into the trial without the burden of having to produce admissible evidence.

However, the prejudice did not stop there. In closing argument, trial counsel played up the petitioner's possession

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[4]The military judge did not make any findings of fact so this Court is left with little assistance in evaluating her application of the M.R.E. 403 balancing test.

of Lasix, adding that "he knew what that was used for." (R. 337, 350). In fact the petitioner testified that he used Lasix because he was on the overweight program and the Lasix allowed him to take off water weight. (R. 255). The petitioner never testified that he even knew that Lasix was believed to beat a urinalysis test. This was pure innuendo injected by the trial counsel based on irrelevant testimony. *See e.g. Perry, supra.*

An accused should not be convicted based on innuendo, especially when the innuendo is completely unsupported by any evidence, either in or outside the record.

Conclusion

For the foregoing reasons, this Honorable Court should reverse the decisions of the Air Force Court of Criminal Appeals and the Court of Appeals for the Armed Forces and set aside the findings and sentence. Petitioner respectfully submits that the Court of Appeals for the Armed Forces and the Air Force Court of Criminal Appeals erred in deciding that evidence relating to Lasix was relevant and petitioner was harmed by this error.

WHEREFORE, petitioner requests that this writ be granted.

Respectfully submitted,

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April 1997

APPENDIX A

UNITED STATES, Appellee

v.

David R. CURTIS Technical Sergeant
U.S. Air Force, Appellant

No. 96–0104

ACM S28841

United States Court of Appeals for the Armed Forces

Argued October 3, 1996

Decided January 22, 1997

Counsel

For Appellant: *Captain W. Craig Mullen* (argued); *Colonel Jay L. Cohen* (on brief); *Colonel David W. Madsen* and *Major Ormond R. Fodrea.*

For Appellee: *Major Allen G. Erickson* (argued); *Colonel Jeffery T. Infelise, Lieutenant Colonel Thomas E. Schlegel* and *Captain Timothy G. Buxton* (on brief); *Colonel Theodore J. Fink* and *Lieutenant Colonel Michael J. Breslin.*

Military Judge: Martha H. Bower.

Opinion of the Court

COX, Chief Judge:

The issue in this drug prosecution case is whether evidence regarding appellant's possession and use of Lasix, a nonprescription diuretic, was admissible, and if so, whether

trial counsel's argument thereon was permissible.[1] A special court-martial composed of officer and enlisted members sitting at Davis-Monthan Air Force Base, Arizona, convicted appellant, contrary to his pleas, of possessing and using marijuana, in violation of Article 112a, Uniform Code of Military Justice, 10 USC § 912a. The members sentenced appellant to a bad-conduct discharge, confinement for 6 months, and reduction to E–4. The convening authority approved the adjudged sentence, and the Court of Criminal Appeals affirmed the findings and sentence in an unpublished opinion.

Appellant was an "aircraft technician/crew chief," who worked on "F–106s, T–33s, and B–57s." At the time of his court-martial, he had approximately 19 years and 11 months of creditable service.

The circumstances leading up to the court-martial originated in the civilian community when one of appellant's estranged sons reported to Tucson police officials that appellant was using drugs. Several days later, another of appellant's estranged sons requested and received police assistance while he removed certain personal items from appellant's home. At the home, the responding officer spoke to appellant and detected an odor of marijuana emanating from appellant's mouth.

A search of appellant's home a few days later produced nominal quantities of marijuana plant parts, as well as various containers and paraphernalia containing or coated with

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[1]The granted issue asks:

> WHETHER THE MILITARY JUDGE ERRED TO THE SUBSTANTIAL PREJUDICE OF THE APPELLANT BY ALLOWING QUESTIONS, TESTIMONY, AND ARGUMENT CONCERNING LASIX.

marijuana residue. All contraband items were seized from the master bedroom and an adjacent closet. Analysis of a urine specimen submitted voluntarily by appellant the day of the search resulted in a "positive" finding of marijuana metabolite.

During the Government's case-in-chief, a forensic toxicologist testified that "Lasix is a trade name for a drug called furosemide, I believe. It's a diuretic. It's used for certain patients to increase fluid output." This testimony was adduced without defense objection during the witness's general explanation of the laboratory testing of appellant's urine specimen. Trial counsel had asked the toxicologist to explain the "Lasix" entry contained on one of the laboratory forms. The witness explained that this reflected a request by "the local submitting unit" to test appellant's urine for Lasix. The witness also testified that, as far as he knew, Lasix testing was not performed on appellant's urine and that his laboratory, in any event, was not equipped to conduct such a test.

During examination of the same witness by the court, a member submitted a written question again asking, *inter alia,* why Lasix testing was not performed. The military judge paraphrased the question in the following manner without defense objection:

> MJ: I understand that there's an objection[2] to the second question; however, it was covered briefly during, I believe, direct examination. I am going to ask it.

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[2]The military judge's mention of this objection is the only reference to it in the record, as far as we can determine. Nonetheless, appellate defense counsel assert that the basis for the objection was relevance. We agree that relevance, hearsay, or perhaps lack of personal knowledge are plausible bases for the objection under the circumstances.

Q. Doctor, . . . with reference to Column E, why is the annotation "Lasix" in there, if you know?

A. **My understanding of the sample or the circumstances was that there was suspicion that the individual was taking Lasix to dilute the urine sample; and, therefore, they requested that the sample be tested for the presence of Lasix.**

(Emphasis added.) The toxicologist went on to explain again that relatively few laboratories were set up to test for Lasix and that his laboratory was not one of them.

During cross-examination on the merits—and over defense objection as to relevance—appellant was asked about the "substance in [his] house that was seized by the OSI called Lasix. . . ." Appellant confirmed that such a substance was seized from his house and that he had obtained it "from an acquaintance." Appellant testified that he had used the substance "about a year and a half ago" to help him in a weight–loss program. According to appellant, the acquaintance represented that Lasix "takes water off. If you take it the day before you go weigh in, you'll weigh considerably less." Appellant acknowledged that "it did make [him] go to the bathroom more."

On closing argument, trial counsel adverted briefly to the toxicologist's description of Lasix, to appellant's possession of it, and to appellant's understanding of its properties. In addition, counsel patently implied that Lasix was something appellant used to mask his marijuana usage.

At the outset, we agree that the investigators' intentions with respect to Lasix testing were irrelevant and that, in any event, the toxicologist was not the proper person to declare that intent. Nevertheless, it was not the investigators' intent that caused appellant problems. To the contrary, it was

evidence that appellant knowingly possessed and used Lasix, coupled with trial counsel's closing argument, that worked to appellant's detriment. Thus, if this evidence and argument were properly received, appellant could not have been prejudiced by evidence of the investigators' obvious intent.

Thus, the question is, in a prosecution for drug possession and use, is it relevant that the accused also possessed a substance which might reduce the possibility of his testing positive on a urinalysis? The military judge and the Court of Criminal Appeals answered this question in the affirmative, and so do we.

As a general proposition, all evidence is relevant as long as it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable tha[n] it would be without the evidence." Mil.R.Evid. 401, Manual for Courts–Martial, United States, 1995 ed.

Furthermore, "[a]ll relevant evidence is admissible, except as otherwise provided. . . ." Mil.R.Evid. 402. One such exception is Mil.R.Evid. 403, which excludes evidence, although relevant, "if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues. . . ," *etcetera.*

We review a military judge's ruling admitting or excluding evidence for abuse of discretion, *United States v. Sullivan,* 42 MJ 360, 363 (1995). We find none here.

A number of inferences might be drawn from the finding of Lasix in appellant's home. One of them, obviously is that appellant used it, as he testified, for weight reduction. Indeed, the findings of guilty do not, in and of themselves, establish that the members rejected this assertion.

Another possible inference is that the Lasix belonged to a different member of the household and had no nexus to

appellant. Appellant's own testimony, however, seems to have eliminated this inference.

Another inference quite clearly available, however, is the one argued by the prosecution—that the Lasix was used by appellant to minimize his chances of getting caught in a random urinalysis. In this respect, the Lasix constitutes indirect evidence of the charged offenses by showing an effort to avoid detection. Moreover, it shows consciousness of guilt, rebutting a claim of innocent ingestion.[3]

Under the circumstances of the instant case, we are satisfied that the military judge adequately balanced the pertinent relevance factors, and that the probative value of appellant's possession and use of Lasix was not outweighed by any unfair prejudice or confusion that may have been caused by admission of this evidence. Thus, we are also satisfied that trial counsel's comment thereon in closing argument was permissible.

The decision of the United States Air Force Court of Criminal Appeals is affirmed.

Judges CRAWFORD, GIERKE, and EFFRON concur.

Sullivan, Judge (concurring):

The substance "Lasix" was found inside appellant's home by police executing a valid search warrant. *See United States v. Procopio*, 88 F.3rd 21, 29–30 (1st Cir. 1996) (guns found at accused's apartment admitted to show association in criminal venture). The military judge considered the probative value of this evidence and the potential for undue prejudice.

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[3]The theory of the defense was that one of appellant's estranged son's must have placed marijuana in cookies he baked for appellant. Regarding the contraband found in appellant's bedroom and closet, it was the defense position that it belonged to appellant's wife who, without appellant's knowledge, smoked marijuana regularly.

See Mil.R.Evid. 403, Manual for Courts–Martial, United States, 1984. I see no legal error. *See United States v. Golb*, 69 F.3rd 1417, 1428 (9th Cir. 1995) (traces of cocaine on money involved in criminal scheme).

APPENDIX B

UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Technical Sergeant DAVID R. CURTIS,

FR217–60–9058

United States Air Force

ACM S28841

29 August 1995

Sentence adjudged 30 April 1993 by SPCM convened at Davis-Monthan Air Force Base, Arizona. Military Judge: Martha H. Bower.

Approved sentence: Bad-conduct discharge, confinement for 6 months, and reduction to E-4.

Appellate Counsel for Appellant: Colonel Jay L. Cohen, Lieutenant Colonel Frank J. Spinner, Captain Eric N. Eklund, and Captain Robert K. Coit.

Appellate Counsel for the United States: Colonel Jeffery T. Infelise, Colonel Thomas E. Schlegel, Major John H. Kongable, and Captain Timothy G. Buxton.

Before

DIXON, SCHREIER, and STARR

Appellate Military Judges

OPINION OF THE COURT

SCHREIER, Judge:

Contrary to his pleas, members convicted appellant of using and possessing marijuana and sentenced him to a bad-conduct discharge, confinement for 6 months, and reduction to E-4. Article 112a, UCMJ, 10 U.S.C. 912a (1984). The convening authority approved the adjudged sentence. Appellant asserts eight assignments of error involving the failure to grant a challenge for cause, admissibility of evidence, instructional errors, new matters in the post-trial addendum, and sentence appropriateness. Finding no prejudicial error, we affirm.

While his appeal was pending, appellant petitioned this court for a new trial based on newly discovered evidence which supports his claim of innocent ingestion. We deny the petition for a new trial.

FACTS

The Air Force Office of Special Investigations (AFOSI) initiated an investigation into appellant's suspected drug abuse following contact with appellant's twenty-year-old son, Daniel Curtis. A search of appellant's house found marijuana stems and seeds in a coffee can in the rear of the closet, an ashtray containing both cigarette ashes and marijuana roaches in the nightstand drawer, and marijuana residue on both a straw and paper clip. All items were found in the master bedroom. Appellant consented to a urinalysis which turned out positive for marijuana.

At trial, appellant introduced good character evidence and denied knowing possession or use of marijuana. Appellant's wife admitted that the stems, seeds, and roaches belonged to her. She said she used marijuana to control her manic-depressive disorder, but stated she never used it in front of appellant. Appellant denied knowing his wife used

marijuana. Appellant testified that about one month before the urinalysis his son, Daniel, gave him homemade cookies for his personal consumption. Appellant stated that the cookies were kept in his bedroom and he ate them over the course of the month, finishing them off several days before the urinalysis. These cookies were the only thing he ate during the four days before the urinalysis that he did not make or purchase at a store. After the urinalysis was reported as positive, he said the only thing that he could think of to account for it was the cookies.

NEW TRIAL PETITION

Article 73, UCMJ, 10 U.S.C. § 873, provides that an accused may petition for a new trial on the grounds of newly discovered evidence or fraud on the court. Newly discovered evidence is evidence that was discovered after trial, could not have been discovered before trial in the exercise of due diligence, and this newly discovered evidence, if considered by the court-martial, would probably produce a substantially more favorable result for the accused. R.C.M. 1210(f)(2). The petitioner bears the burden of showing that a new trial would probably produce a substantially more favorable result. *United States v. Parker,* 36 M.J. 269 (C.M.A. 1993).

Appellant submits six documents in support of his new trial petition. Only the notarized statement from Ms Tanya Davis, his son's girlfriend, is newly discovered evidence. It describes a conversation, which took place after appellant's court-martial, wherein Daniel allegedly admitted setting "his dad up with things he made." It is very similar to other hearsay statements excluded at trial. However, this newly discovered evidence does not independently support a new trial unless its consideration by the court-martial would produce a substantially more favorable result. R.C.M. 1210(f)(2).

Before we can evaluate the impact of this evidence, we must determine if her statement is admissible at a new trial. *See United States v. Johnson,* 28 C.M.R. 662, 685 (N.B.R. 1959) (inadmissible polygraph could not support a new trial). It would be incongruous to grant a new trial if defense counsel could not then introduce the "newly discovered evidence." How can there be a substantially more favorable result if the evidence does not go to the factfinder?

Appellant has provided no hearsay exception justifying admission of this statement. Rather, he argues that this evidence is admissible under fundamental due process principles which give an accused the right to present exculpatory evidence. *See Chambers v. Mississippi,* 410 U.S. 284, 298 (1973) (due process violation when appellant was not permitted to impeach his own witness who had previously repudiated his confession to the murder); *United States v. Johnson,* 3 M.J. 143, 147 (C.M.A. 1977) (exclusion of third party's confession after that person took their Fifth Amendment rights was error). However, even exculpatory evidence must exhibit certain circumstances guaranteeing trustworthiness. *Chambers v. Mississippi,* 410 U.S. at 300; *United States v. Burks,* 36 M.J. 447, 451 (C.M.A.) *cert. denied,* 114 S. Ct. 187 (1993).

We find insufficient guarantees of trustworthiness in the affidavit of Ms. Tanya Davis. First, by her own affidavit, Daniel is a "phycopathic lier [sic]." Second, trial defense counsel's affidavit states that Daniel told him that he did not put marijuana in any food and did not use marijuana. Third, Ms. Davis supposedly heard this statement in August 1993, but it appears she did nothing to release an "innocent man" for some time. Fourth, there is no indication of the circumstances surrounding Daniel's alleged statement that would help support its trustworthiness. It is unknown whether he was trying to impress the girlfriend, under the influence, or

plotting further revenge. Fifth, Ms. Davis' affidavit was not made under oath. Sixth, there is minimal corroboration for the statement. The statement lacks specific details which could be verified through scientific testing as to how the marijuana was placed in the cookies. The facts that father and son did not get along and that Daniel gave his father cookies at Christmas are not sufficient to corroborate the statement. Likewise, other hearsay statements, offered but not admitted at trial, do not provide sufficient guarantees of trustworthiness. Additionally, unlike *Chambers* where the declarant had made multiple confessions, Daniel has only indicated to a girlfriend that he "set his dad up." Seventh, there is no indication that Daniel is unavailable to currently address this issue, but we know he was available and not called as a witness at the original trial. As in the hearsay exceptions for a statement against interest, or the residual hearsay rule, we believe the availability of the declarant is a factor to be considered in evaluating the trustworthiness of a statement. Mil.R.Evid. 804(b)(3) and (b)(5); *see United States v. Wind,* 28 M.J. 381, 385 (C.M.A. 1989).

Appellant has failed to meet his burden of proving that newly discovered evidence would be admissible at trial where it might have an impact on the result. The petition for a new trial is denied.

CHALLENGE FOR CAUSE

Throughout this trial the court members, especially SMSgt Landis, asked numerous questions. Following the accused's testimony, the questioning by court members continued. The military judge reemphasized the role of the members and reminded them they must remain impartial when questioning witnesses. SMSgt Landis then proposed several additional questions. The military judge refused to ask

the questions stating that they went more to sentencing matters.

Trial defense counsel subsequently challenged SMSgt Landis for cause claiming he had already made up his mind concerning guilt and the tone of his questions went towards determining an appropriate sentence. During individual *voir dire* by the military judge, SMSgt Landis denied having made up his mind. Trial defense counsel asked no questions and the military judge denied the challenge. Appellant now alleges the military judge abused her discretion.

A military judge's denial of a challenge for cause will be overturned only if there was a clear abuse of discretion. *United States v. Hamilton,* 41 M.J. 22 (C.M.A. 1994), *cert. denied,* 115 S. Ct. 738, 130 L.Ed.2d 640 (1995). Challenges for cause should be liberally granted. *See United States v. White,* 36 M.J. 284, 287 (C.M.A. 1993). The appellant bore the burden of establishing the basis for his challenge for cause. *United States v. Blocker,* 32 M.J. 281, 287 (C.M.A. 1991). A court member must be mentally free to render impartial findings and sentence based on the law and the evidence. *United States v. Reynolds,* 23 M.J. 292, 294 (C.M.A. 1987). The question of bias is one of evaluating credibility and demeanor and the military judge's determination is entitled to great deference on appeal. *White,* 36 M.J. at 287; *Reynolds,* 23 M.J. at 294.

The initial questions by SMSgt Landis concerning appellant's consumption of the cookies and his not feeling well during the month of January were factually based and reflected a reasonable concern of the court member. While the subsequent questions, if asked, are more argumentative in nature, we do not find that they clearly reflect a bias or prejudgment. In any event, the proposed questions could probably be reworded to remove the argumentative tone. The fact that the military judge has refused to ask certain questions

does not independently establish the basis for a challenge for cause. Court members are not attorneys and may not appreciate the nuances of artfully questioning a witness while resolving a conflict.

SMSgt Landis assured the military judge that he had not made up his mind and was able to listen to the evidence presented. The military judge observed his response to questions as well as his prior demeanor in court. She had previously expressed her concerns over the nature of his questions when she refused to ask them. Yet, after the *voir dire* she determined he could impartially sit. We find that the military judge did not abuse her discretion in denying the challenge for cause.

LASIX EVIDENCE

The agents conducting the search of appellant's house found Lasix, a nonprescriptive diuretic, and requested that appellant's urine sample be tested for Lasix. However, the Brooks lab does not perform that type of testing. Additionally, Lasix was mentioned in appellant's cross-examination and during trial counsel's closing argument. Trial defense counsel did not object to the mention of Lasix in the litigation package, or in the testimony of the expert witness. However, counsel did object to the cross-examination of appellant. The military judge allowed the cross-examination of appellant after she determined that appellant talked with the AFOSI concerning his use of Lasix to control his weight. Appellant now alleges the military judge erred.

Lasix is a nonprescription diuretic which causes increased urination. Since THC (the marijuana metabolite) is excreted through urine, there is a belief by some that use of Lasix may help the body void the traces of marijuana use.

The military judge's decision to admit evidence will not be overturned unless there is a clear abuse of discretion. *United States v. Orsburn*, 31 M.J. 182 (C.M.A.) *cert. denied*, 498 U.S. 1120 (1990). Relevant evidence is evidence that makes the existence of any fact of consequence to the action more or less probable. Mil.R.Evid. 401. Relevant evidence is admissible unless its probative value is substantially outweighed by the danger of unfair prejudice. Mil.R.Evid. 403.

Once the laboratory report mentioning Lasix was admitted, the subsequent questioning of the expert was relevant. Likewise, the cross-examination of appellant was not a wild goose chase but was based on substantive evidence of appellant's possession of the diuretic and questioned his knowledge of its effect. Trial counsel's passing reference to Lasix was fair comment on the evidence. We find that the military judge did not abuse her discretion in allowing the testimony or argument.

HEARSAY EVIDENCE CONCERNING INNOCENT INGESTION DEFENSE

Appellant sought to introduce the testimony of his step-daughter and her friend who overheard his son, Daniel, talking about putting marijuana in a cake and some brownies. Trial counsel objected to this testimony as hearsay. Trial defense counsel indicated that they may have to call the son as a witness and later indicated that Daniel was on standby. The military judge ruled the testimony was inadmissible hearsay. Daniel was not called as a witness.

Appellant now argues that exclusion of this evidence violated his fundamental due process right to present a defense. *See Chambers v. Missssippi*, 410 U.S. at 302; *United States v. Johnson*, 3 M.J. at 148. This due process argument

was previously addressed in our discussion of the new trial petition. Once again, we find that there was no mechanical application of the hearsay rules to prevent appellant presenting a defense. We do not accept trial defense counsel's argument that the proffered testimony is not hearsay because it is not being offered to prove Daniel doctored brownies or a cake. The testimony, as to what the witnesses overheard, was classic hearsay and did not fit under any of the hearsay exemptions. Although appellate defense counsel refers to R.C.M. 803(3) in its brief, that exception requires that the declarant b unavailable and trial defense counsel acknowledged that Daniel was available to testify and was currently on standby. There was no error in the exclusion of evidence.

APPELLANT'S PRIOR USE OF MARIJUANA

The appellant testified that he did not knowingly use marijuana. His only possible explanation for the positive urinalysis was that the cookies made by his son contained marijuana. He further stated that he had not experienced any effects from eating the cookies. Over objection, the military judge permitted trial counsel to question appellant about his prior use of marijuana outside the time frame of this charged use. However, the military judge strictly limited the contents of this questioning to the effects of marijuana in his system and its use during a two year break in service.

The Court of Appeals for the Armed Forces (formerly the Court of Military Appeals) established a two part test for evaluating evidence of prior use of marijuana in a drug case. First, is the evidence admissible and second, what is the prejudicial effect of the evidence compared to its probative value? *United States v. Holmes,* 39 M.J. 176, 180 (C.M.A. 1994). The Court determined that evidence of a prior use in the distant past was not *per se* inadmissible. *Holmes* 39 M.J.

at 180. Here, the evidence was admitted for the limited purpose of establishing that appellant's prior use made him aware of the effects of marijuana on him. This evidence was relevant when appellant denied experiencing any effects and the expert indicated that consumption of a recreational dose of marijuana would most likely produce some effects. Likewise, the military judge carefully considered the prejudicial impact of this testimony and appropriately limited the testimony. Unlike *Holmes*, there was no evidence of lying to the Air Force to conceal his prior use or intertwining of the false statements and the prior drug use in closing argument. That is not the situation here. The evidence, as admitted, was not unfairly prejudicial. There was no error.

DELIBERATE AVOIDANCE INSTRUCTION

Deliberate avoidance of a fact can create the same criminal liability as actual knowledge. *United States v. Newman,* 14 M.J. 474, 478 (C.M.A. 1983). Appellant argues that the evidence was insufficient to raise the issue of deliberate avoidance. We disagree.

Appellant's wife admitted she used marijuana approximately 300 times in the two years prior to the trial. When asked if appellant knew of her use, she stated "He never seen me, *but I think he might have suspected,* but I never allowed him to see it." (emphasis added). She admitted to using marijuana in her bedroom where the seeds, stems, and ashtray containing roaches were found. Appellant's step-daughter also indicated that she had seen her mother smoke marijuana at a prior assignment. The testimony indicates that there was only one nightstand in the room and that both appellant and his wife smoked cigarettes. We find there was minimally sufficient evidence to suggest that the appellant deliberately avoided any knowledge that his wife used

marijuana in the house and kept marijuana in his house. There was no error in the instruction.

NEW MATTERS IN THE ADDENDUM

If the addendum to the Staff Judge Advocate's (SJA) review contains new matter, it must be served on counsel for the accused. R.C.M. 1106(f)(7). New matter includes information from outside the record of trial but does not ordinarily include any discussion of the correctness of the defense comments on the SJA recommendation. R.C.M. 1106(f)(7), Discussion; *United States v. Komorous*, 33 M.J. 907, 910 (A.F.C.M.R. 1991).

The issue of the interaction between appellant's expiration of enlistment, his continued entitlement to pay, and an appropriate sentence was initially raised during trial. Trial defense counsel requested a specific instruction in this area and the members asked several questions. In each case, the military judge refused to provide information on a collateral matter. Appellant's clemency submissions included letters from several court members indicating confusion about the relationship between appellant's expiration of enlistment and his entitlement to pay while in confinement. In response, the 17 August 1993 addendum stated:

> Although TSgt Curtis had an approved date of separation (7 June 1993) and his pay should have been stopped at that time, he has actually still been receiving pay as a TSgt. We have advised the finance office of their mistake and TSgt Curtis' pay has in fact been stopped. Although we have inquired whether there are any ways to restore his pay status, we have been advised that there are none.

Appellant argues that this statement is new matter and should have been served on counsel. We disagree. This

statement is more than an opinion on the merits of appellant's requests, as it clearly provides the convening authority with limited factual information from inside and outside the record of trial. However, we do not view this as new information in the traditional sense. This information was not incorrect, inadequate or misleading nor highly prejudicial to the accused. *United States v. Narine,* 14 M.J. 55, 57 (C.M.A. 1982). Nor does it contain new appellate decisions. *United States v. Komorous,* 33 M.J. 907, 910 (A.F.C.M.R. 1991). This information was known to appellant. In fact, the trial defense counsel initially raised the issue at trial. Additionally, appellant should have been well aware of the fact that he was receiving pay after his enlistment expired and when his pay stopped. Finally, the clemency submissions persuasively argued that the members may have sentenced appellant differently had they known the additional facts. We find that the questioned statement was not new matters, but was factual comment of information developed in the record of trial and known to appellant.

However, even if we were to determine this statement to be new matter, based on the facts previously stated we find this error resulted in no prejudice to appellant and will not return the record for a new action. Congress indicated its intent that the military appellate courts have the ability to correct errors themselves stating "it is the Committee's intent that appropriate corrective action be taken by the appellate authorities without returning the case for further action by a convening authority." S. Rep. No. 53, 98th Cong., 1st Sess. 21 (1983). *See United States v. Crawford,* 34 M.J. 758 (A.F.C.M.R. 1992); *Komorous*, 33 M.J. at 911.

REMAINING ASSIGNMENTS OF ERROR

We have considered appellant's remaining assignments of error and resolve them against appellant. The military

judge did not err in refusing to instruct on the impact of appellant's expiration of his enlistment on pay and forfeitures. *United States v. Quesinberry*, 12 U.S.C.M.A. 609, 612, 31 C.M.R. 195, 198 (1962). The sentence of a bad-conduct discharge for a member with over 19 years on active duty who possessed and used marijuana is not inappropriately severe. *United States v. Healy*, 26 M.J. 394, 395–96 (C.M.A. 1988).

The petition for a new trial is denied. We further conclude the findings and sentence are correct in law and fact, the sentence is appropriate, and no error prejudicial to appellant's substantial rights occurred. Accordingly, the findings and sentence are

AFFIRMED.

Chief Judge DIXON and Judge STARR concur.

OFFICIAL

LAURA L. GREEN
Clerk of Court